identifying data deleted to prevent clearly unwarranted invasion of personal privacy
PUBLIC COPY

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 28 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a dental office. It seeks to employ the beneficiary permanently in the United States as an [redacted] pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. Additionally, the director found that the petitioner failed to establish that the beneficiary met the requirements of the position offered.[1] The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 2, 2009 denial, the issues in this case are: whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence; and whether the petitioner has established that the beneficiary met the requirements of the position offered by the time of the priority date.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the

[1] In his decision, the director noted a discrepancy in information provided: the petitioner listed on ETA Form 9089 that the beneficiary was from [redacted] The director raised this issue in his RFE. The petitioner stated that it was a typographical error and that the beneficiary was from the [redacted] Nothing in the record shows that the beneficiary was born in or resided in [redacted] We accept the petitioner's explanation on this issue. This did not form a basis for the petition's denial.

> priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by the respective DOL national processing center. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted for processing by DOL on August 14, 2005.[2] The proffered wage as stated on the ETA Form 9089 is [redacted] per year based on a 40 hour work week. The ETA Form 9089 was certified on September 22, 2006. The ETA Form 9089 states that the position requires: a Doctorate in [redacted] and the following specific skills in box H.14: "[redacted]"

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. The petitioner listed the following information on the I-140 petition filed on November 8, 2006: date established: April 2002; gross annual income: [redacted] net annual income: [redacted] and current number of employees: 8.[4] On the ETA Form 9089, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

---

[2] The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current Department of Labor (DOL) regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym [redacted] for [redacted] *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The [redacted] regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. Since the instant labor certification application was filed after March 28, 2005, it is governed by the [redacted] regulations.

[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[4] ETA Form 9089 filed in 2005 stated that the petitioner had four employees. The petitioner's website shows that it currently has five employees. *See* [redacted] (accessed October 21, 2010).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in August 2005 onwards. On appeal, the petitioner submitted one W-2 statement for 2007 showing that the petitioner paid the beneficiary [redacted] in wages. The beneficiary states that the petitioner employed him for six to ten days in 2007. The record contains no other evidence of wages paid to the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their

adjusted gross income (AGI) or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than [redacted] where the beneficiary's proposed salary was [redacted] or approximately thirty percent [redacted] of the petitioner's gross income.

Although the petitioner had submitted sample bills in response to the director's RFE, the director was unable to conclude that the petitioner could pay the proffered wage, as the sole proprietor did not submit a list of monthly expenses. The sole proprietor submitted a self-estimate of annual expenses on appeal, which included: credit card payments, mortgage payments, auto payments, insurance payments, utility payments, cell phone, cable/internet, child care and gardening. The self estimate included a number of sample bills issued to the sole proprietor to support the estimate.

The AAO sent a request for additional evidence on August 13, 2010, which noted that the sole proprietor's self-estimate did not appear to include other regularly occurring monthly expenses such as food expenses to feed a family of three, gas expenses (separate from auto payments, as such expenses appeared on one bill in the amount of [redacted] in one month), clothing for a family of three, and student loans that the sole proprietor or his wife may have.[5]

The AAO's RFE also noted that the petitioner submitted a letter from [redacted] as well as a declaration from the sole proprietor, which both state that the petitioner's business could be expected to face additional start-up costs of [redacted] to [redacted] in hiring the beneficiary to pay for additional equipment and space for the beneficiary's position. Additionally, both estimate that the petitioner would incur an additional [redacted] a month in overhead "and other recurring expenses" in hiring the beneficiary. The petitioner asserts that the beneficiary's specialty practice would generate revenue in the amount of [redacted], to defray these costs and cites to *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) in support. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of USCIS for failure to specify a

[5] The sole proprietor's 2005 tax return reflects a deduction for student loan interest, which would reflect that either the sole proprietor or his wife had student loans in that year. In 2005, qualified loan recipients could take a deduction on student loan interest paid if modified adjusted gross income (MAGI) was less than [redacted] if filing a joint return) and other conditions were met. See IRS Publication 970, Tax Benefits for Education, http://www.irs.gov/pub/irs-prior/p970--2005.pdf (accessed August 4, 2010). Other tax returns did not reflect any deduction for student loan interest. In response to the RFE, the sole proprietor states that he and his spouse paid off their student loans in 2004. Other tax returns did not reflect any deduction for student loan interest.

formula used in determining the proffered wage.[6] The RFE additionally noted that the petitioner had not provided specific details or documentation to explain the projected revenue stream that the beneficiary will generate or any projected time table on how long it would take to develop a client base to offset the expected equipment and overhead costs.

Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The AAO requested that the petitioner submit evidence related to any additional liabilities[7] and expenses not addressed in the sole proprietor's self estimate submitted on appeal, as well as credible evidence to document expected start-up equipment required, and the length of projected time to obtain the necessary client base to generate the additional revenue required to meet monthly overhead and expenses related to the beneficiary's employment.

In response to the RFE, the sole proprietor submitted a declaration. Regarding his personal expenses, he estimated that his family spent approximately [redacted] month on food, [redacted] month on clothing, and [redacted] per month on gas. This would result in additional monthly expenses of [redacted] With respect to liabilities, the petitioner submitted an estimate dated approximately two years later, August 31, 2010, which shows that the sole proprietor reduced his liabilities by over [redacted] but that his total assets remained the same.

The sole proprietor states that he has already "installed a [redacted] expense of [redacted]' which was done subsequent to filing the labor certification [exact date not specified]. The operatory includes: an [redacted] The sole proprietor estimates that the only remaining equipment required prior to an oral surgeon beginning would be "some electric hand pieces (tools required for performing oral surgery)." These would cost an

---

[6] Subsequent to that decision, USCIS implemented a formula that involves assessing wages actually paid to the alien beneficiary, and the petitioner's net income and net current assets.

[7] We note that the record reflects that the sole proprietor has substantial liabilities based on the [redacted] July 31, 2008 estimate submitted, which reflects total liabilities in the amount of [redacted] and total assets in the amount of [redacted]

estimated [redacted] and a general [redacted] which would cost an estimated [redacted] He additionally estimates that additional materials should only cost approximately [redacted] per month, or much less than the original estimate of [redacted] per month as originally anticipated. Additionally, a search of the petitioner's website lists current services offered as including oral surgery. *See* [redacted] (accessed October 22, 2010).

The petitioner asserts that the income the beneficiary will generate will more than adequately cover these costs. Specifically, the sole proprietor estimates that the beneficiary would have immediate work from internal referrals from his seven hundred patient base.[8] He states in his declaration that based on internal referrals alone, an oral surgeon he employed would have "between 4-11 cases per month, which would generate [redacted] per month in additional revenue [annualized to [redacted] per year]." Counsel summarizes that this includes one to three implant cases every month, and that he refers out three to eight molar extraction cases per month. He concludes that the monthly fees generated would "vastly exceed" the costs associated with employing the beneficiary. Additionally, the sole proprietor estimated that his practice would receive additional referrals from outside dentists as "there is a shortage of qualified oral surgeons in the Snohomish County area." He estimates that referrals might initially be slow, but by the end of the first year, external referrals might result in two to five oral surgery cases per month, which would generate between [redacted] per month [annualized to [redacted] per year]. Counsel estimates that the combined internal and external referrals would result in monthly total income of [redacted] [annualized to [redacted], but that overhead and the beneficiary's monthly salary combined would only be [redacted] per month [annualized to [redacted] to [redacted] To demonstrate the growth in the petitioner's practice, counsel reviews the petitioner's gross income year-to-year, which shows a 22% increase from 2005 to 2006, a 34% increase from 2006 to 2007; a 19% increase from 2007 to 2008 and a 25% increase from 2008 to 2009. The numbers reflect that the business has continued to grow and is not static.

In examining the tax returns specifically, in the instant case, the sole proprietor supports a family of three in [redacted].

The sole proprietor's tax returns reflect the following information for the following years:

---

[8] The petitioner submitted business banking statements with the underlying filing for 2008 and 2009, which reflect both substantial credits and substantial debits to verify the petitioner's regular business stream.

[9] A general search online shows that [redacted] are highly compensated: *see* [redacted] (accessed October 21, 2010), which estimates that an [redacted] is one of the top ten highest paying careers and that average pay is [redacted] but the top 5% make more than [redacted] Another estimate for 2008 shows the median pay as [redacted] *See* [redacted] (accessed October 21, 2010).

[redacted]

Tax Year	Sole Proprietor's AGI (1040)	Sole Proprietor's Gross Receipts (Schedule C)	Sole Proprietor's Wages Paid (Schedule C)	Sole Proprietor's Net Profit from business (Schedule C)
2009	[redacted]			
2008				
2007				
2006				
2005				

Tax Year	Estimated Personal Expenses	Proffered Wage	Total Amount petitioner must show	Estimated Equipment and Costs for the beneficiary's initial employment
2009	[redacted]			
2008				
2007				
2006				
2005				

[10] The petitioner identified these additional expenses on appeal in response to the AAO's RFE.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in [redacted] Her clients included [redacted] The petitioner's clients had been included in the lists of the best-dressed [redacted] The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in [redacted] The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the sole proprietor's tax returns reflect that the sole proprietor could pay the proffered wage and support his dependents in 2007, 2008, and 2009. In 2006, the gap between the estimated expenses, proffered wage, and AGI, is relatively small and depends partially on the accuracy of the petitioner's self-estimated expenses. The AAO has no reason to doubt the accuracy of the self-estimated expenses as they are well-reasoned and supported. The only borderline year appears to be in the year of the priority date, where the gap between the estimated expenses, proffered wage, and AGI is much larger when factoring in start-up expenses to bring in an oral surgeon. However, given the growth in the petitioner's business demonstrated year-to-year, the documented volume of credits and debits in the petitioner's business accounts, the sole proprietor's reduction of personal liabilities, and most compellingly, the documented ability of an oral maxillofacial surgeon to generate income for the petitioner, in assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has established that it has the continuing ability to pay the proffered wage beginning on the priority date.

The second issue that the director identified is that the petitioner failed to establish that the beneficiary met the requirements of the labor certification. To determine whether a beneficiary is eligible for an employment based immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d

1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089, filed on August 14, 2005, requires a [redacted], and no additional experience or training. ETA Form 9089, Section H.14, specific skills requires: [redacted] and [redacted]'

The beneficiary states on ETA Form 9089 that he completed a [redacted] at the [redacted] While the year completed appears to be an error, documentation submitted shows that the beneficiary completed a [redacted]. The record additionally contains a copy of the beneficiary's certificate from the [redacted] to demonstrate that the beneficiary completed training in [redacted] from July 1, 1999 to June 30, 2003, that he received a license from the state of [redacted] on July 22, 1998 to practice [redacted] he received a [redacted] on September 16, 2003, and that he was granted the status of '[redacted] by the [redacted] on March 1, 2006.

At issue is the meaning of "national" certification required on the labor certification, and whether the beneficiary meets this requirement.

On appeal, counsel asserts that the petitioner meant national certification required "passing both Part I and Part II of the [redacted] Further, counsel asserts that, in [redacted], to receive his license to practice dentistry, the beneficiary "must pass an examination prepared or approved by and administered under the direction of the [redacted] Assurance Commission." Rev. Code Wash., RCW 18.32.040(3)(a) (2005). Counsel continues that "in turn, the Commission's regulations require 'Proof of successful completion of the National Board Dental Examinations part I and II' in order to receive a license to practice." Wash. Admin. Code., [redacted] (1998). The petitioner's letter submitted from [redacted] also addresses this issue. [redacted] states that:

> In dentistry, passing the two-part exam of the [redacted] is all that is required for national certification. There is no other [redacted] certification" for dentists. Furthermore, in order to practice dentistry in any state, including Washington, you must have passed both parts of the National Board for Dental Examinations. Therefore, by virtue of the fact that [the beneficiary] possesses state licensure as a Dentist and an Oral and Maxillofacial Surgeon, he also possesses the required 'National Certification.'

[redacted] submitted a second letter that states, "residents completing our four year training program [Oral and Maxillofacial Surgery] are not obligated by law to become a member of the [redacted] in order to initiate their practice of oral and

maxillofacial surgery upon graduation."

The AAO requested documentation of how the petitioner advertised the requirement of "national certification" to U.S. applicants, and whether a U.S. applicant applying for the position offered would have understood national certification to mean ABOMS certified as opposed to merely passing the "national board" exam to obtain a dental license.

In response the petitioner submitted: a copy of a job posting in the [redacted], which read that the petitioner sought an '[redacted] required;" a notice of posting, which stated requirements of: "[redacted] Certifications;" a state job order, for an [redacted] which had the following requirements: '[redacted] an ad in the [redacted] and [redacted] which stated the requirements as '[redacted] state board certifications required." In the sole proprietor's declaration, he states that there were no responses to any of the advertisements or postings, and that "there is a shortage of qualified oral surgeons in the [redacted] [the petitioner's location] area."

USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. at 406. In *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), the court found that U.S. Citizenship and Immigration Services (USCIS) "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." In [redacted], the court found that "it was the responsibility of the employer, not [US]CIS, to establish the criteria for the open position." *Id.* The court looked to the employer's intent as the terms of the labor certification were in issue.

A general search online does not show that there is a '[redacted][11] Further, a review of the [redacted] website, which explains "Board Certified" does not reference the credential as reflecting a "National certification." The website states:

> Your Board Certified [redacted] has graduated from an accredited dental school and is licensed in the state in which he/she practices. In addition, this individual has completed an oral and maxillofacial surgery residency program approved by the American Dental Association's Commission on Dental Accreditation.

[11] A general online search shows that there is a "national certification" for dental assistants, that a dental assistant can take the Dental Assisting National Board's (DANB) Certified Dental Examination following completion of an accredited program. State requirements and registration would vary in addition to the national certification. *See* [redacted] (accessed October 22, 2010). Nothing shows that there is any similar certification for dentists, or dental specialties, but rather regulation and licensing is left to each state.

See [redacted] (accessed October 21, 2010).

As Board Certification reflects only that the individual is licensed in the state in which he or she practices, that it does not confer a "national license," and that an [redacted] is not required to be "[redacted] Board Certified" in order to practice in the specialty, we accept the petitioner's explanation regarding the term "national." Given the shortage in the occupation, we do not believe that U.S. applicants would be dissuaded from applying for the position based on the phrase "National and [redacted] certification."

Accordingly, we accept the petitioner's explanation that "National" referenced the National Board of Dental Examinations, required prior to obtaining a dental license. The record demonstrates that the beneficiary passed the National Board of Dental Examinations and he was issued his dental license from the state of [redacted] on July 22, 1998 to practice dentistry in the state of [redacted] Therefore, the petitioner has established that the beneficiary met the requirements of the position offered by the time of the priority date.

As an additional issue, the AAO raised in its RFE that the beneficiary may have had a preexisting relationship with the petitioner and, therefore, the bona fides of the position may be in question. The petitioner has the burden of establishing that a *bona fide* job opportunity exists when asked to show that the job opportunity is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361. A relationship invalidating a bona fide job offer may also arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart* 374, 2000-INA-93 (BALCA May 15, 2000). In *Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. Authority to conduct investigations into fraud or material misrepresentation relevant to alien labor certification applications is conveyed to the Department of Homeland Security (DHS) and by inference to USCIS, in accordance with 20 C.F.R. Part 656.[12] The law of materiality will control the agency's determination that the application should be invalidated. Under *Matter of S & B-C,* 9 I&N Dec. 436 (A.G. 1961), a misrepresentation is material where it shuts off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he or she is

[12] The regulation at 20 C.F.R. § 656.30(d) states in relevant part:

> [A]fter issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application.

inadmissible. An alien's misrepresentation of his or her relationship through blood, financial or social ties to a company's owner during the labor certification process would close off a line of relevant inquiry, which might have revealed that the labor certification process was flawed.

The [redacted] regulation specifically sought to control close relationships between the petitioning entity and beneficiaries to ensure bona fide job opportunities to protect U.S. workers. *See* 20 C.F.R. § 656.17:

> (l) *Alien influence and control over job opportunity.* If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, *or if the alien is one of a small number of employees*, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, *i.e.* , the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:
>
> (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
>
> (2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;
>
> (3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and
>
> (4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.
>
> (5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

Public information shows that [redacted] graduated from the University of [redacted] School of [redacted] for which he received a [redacted] degree in 1997. *See* [redacted] (accessed August 4, 2010). As the beneficiary graduated from the same school and degree program in the same year, the two may have a preexisting relationship. The AAO's RFE questions that given the small size of the petitioner, under ten employees, and the prior social relationship between the petitioner's owner and the beneficiary, whether this raised an issue related to alien influence and control over the job opportunity.

The AAO requested that the petitioner indicate whether DOL audited the [redacted] application prior to certification, and if so, to submit any documentation related to the audit materials sent. Alternatively, the AAO requested that the petitioner should submit evidence as set forth above, items 1 through 5 to address the issue of alien influence and control.

In response, the petitioner indicates that DOL did not audit the labor certification, and that the sole proprietor is not related to the beneficiary through "blood," marriage, or any other family relationship. Further, the beneficiary "has no interest in the petitioning company, and no ability to control its decisions." The sole proprietor singly has responsibility for these decisions, as well as control over interviewing, hiring and firing. As a sole proprietor, the petitioner had no articles of incorporation and no shareholders, partners, or directors. The sole proprietor does share office space with his brother-in-law, with whom he formed a limited liability corporation "for the purpose of allocating . . . [space and overhead] expenses." He submitted the agreement related to the shared office space, and indicated that the shared expenses paid into the LLC are reported on his Form 1040 Schedule C. The beneficiary has no ownership interest in the LLC.

Further, related to the beneficiary's attendance at the same school, the sole proprietor indicates that "only individuals who are qualified to perform 'oral surgery on the mouth' as stated in the labor certification are those who have graduated from an accredited, post-doctoral oral surgery program, such as the University of [redacted]."[13] As the beneficiary has no documented financial interest in the petitioner, and no familial relationship to the petitioner, we find that the petitioner has established a bona fide job offer. While the petitioner and beneficiary might have attended school together, based on the lack of responses to the advertisements, combined with the shortage of oral surgeons in the area, and the fact that the University of [redacted] appears to be the only dental school in [redacted] attendance at the same school would not result in the beneficiary's undue influence on the petitioner. It would be reasonable for the petitioner to recruit from that school.

The AAO also notes that in accordance with our statutory consultation authority at section 204(b) of the Act, we referred this case to DOL presenting the issues about the national certification and the beneficiary's perceived social relationship with the petitioner's owner. DOL did not respond or express concern. Thus, the AAO is satisfied that the DOL considers the labor certification properly certified.

---

[13] A search of dental schools for [redacted] shows that the University of [redacted] is the only school in the state for dental studies. *See* [redacted] html (accessed October 22, 2010): "Students interested in going to dental school in [redacted] may apply to the University of [redacted] - [redacted] at the university offers training for a D.D.S., as well as graduate programs in many dentistry specialties."

Accordingly, we find that the petitioner has overcome the basis for the director's decision. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has been that burden.

ORDER: The appeal is sustained. The petition is approved.